APR 23 1959
JAMES R. BROWNING, Clerk

No. 794

In the Supreme Court of the United States

OCTOBER TERM, 1958

SAM TITLE, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (Pet. App. B) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered January 6, 1959. The petition for a writ of certiorari was filed March 24, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether a final judgment cancelling citizenship, appeal from which had been dismissed for want of

prosecution, should be set aside under Rule 60(b), F.R. Civ. P., more than two years after entry, on the ground that an affidavit of good cause had not been filed with the denaturalization complaint.

STATUTE AND RULE INVOLVED

Section 340(a) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 8 U.S.C. 1451, provides in pertinent part:

> It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 310 of this title in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively * * *.

Rule 60(b), Federal Rules of Civil Procedure, provides in part:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mis-

take, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59 (b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. • • •

STATEMENT

Petitioner, who had been born in Romania and entered this country in 1923, was naturalized in the United States District Court for the Southern District of California on October 24, 1941. On October 21, 1954, the government instituted an action seeking cancellation of the certificate of naturalization under Section 340 of the Immigration and Nationality Act of 1952, on the ground of willful misrepresentation and concealment of material facts in that, although petitioner had been since 1936 a member of the Communist Party which he knew advocated the overthrow of the government of the United States, in the proceedings leading up to his

naturalization petitioner had sworn he believed in the form of government of the United States and did not belong to and was not associated with any organization which teaches and advocates the overthrow of existing government of the United States (R. I. 2-9).[1] No affidavit of good cause was filed with the complaint although the complaint alleged that "Good cause exists for the institution of a suit" (R. I. 9). The District Court overruled petitioner's motion to dismiss the complaint, in which he alleged *inter alia* that the court lacked jurisdiction because of the absence of an affidavit (R. I. 11, 12-22, 23). On July 14, 1955, the District Court entered a decree revoking the judgment admitting petitioner to citizenship, cancelling the certificate of naturalization, and restraining the defendant from claiming any rights under the certificate (R. I. 30-31). The opinion of the District Court is reported at 132 F. Supp. 185.

Petitioner noted an appeal from the judgment of the District Court (R. I. 32), but did not proceed further with the appeal. On February 27, 1956, the Court of Appeals dismissed the appeal for failure to prosecute (R. I. 33-34).

On June 2, 1958, petitioner moved to set aside the District Court's judgment of July 12, 1955, alleging that (1) the judgment was void in that an

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[1] The complaint also alleged a cause of action under Section 338(a) of the Nationality Act of 1940, on the basis of illegal procurement, but the trial judge considered the problem as interrelated with that of concealment (see 132 F. Supp. 185, 187-189).

affidavit of good cause had not been filed with the complaint; (2) it was no longer equitable that the judgment should have prospective application (R. I. 36). No reason was alleged for petitioner's failure to proceed with the appeal from the original judgment. The District Court denied the motion (R. I. 43). The Court of Appeals affirmed, holding that the absence of an affidavit of good cause did not render the judgment void so as to be open to collateral attack, and that the judgment of the District Court that it had jurisdiction was *res judicata*, subject to correction on appeal but not collaterally.

ARGUMENT

1. Petitioner does not seriously quarrel with the proposition that a final judgment, in order to be subject to a motion to set aside as "void" under Rule 60(b)(4), must be "void" in the sense that it would be subject to collateral attack in an independent proceeding. See 7 Moore, *Federal Practice* (2d ed. 1955), pp. 266-267. But the absence of an affidavit of good cause in a denaturalization proceeding does not render a judgment "void" in that sense.

This Court long ago, in *Noble* v. *Union River Logging Railroad Company*, 147 U.S. 165, 173, drew the distinction which is here pertinent:

> It is true that in every proceeding of a judicial nature, there are one or more facts which are strictly jurisdictional, the existence of which is necessary to the validity of the proceedings, and without which the act of the court is a mere nullity: such, for example as the service

> of process within the State upon the defendant in a common law action * * *. In these and similar cases the action of the court or officer fails for want of jurisdiction over the person or subject-matter. The proceeding is a nullity, and its invalidity may be shown in a collateral proceeding.
>
> There is, however, another class of facts which are termed *quasi* jurisdictional, which are necessary to be alleged and proved in order to set the machinery of the law in motion, but which, when properly alleged and established to the satisfaction of the court, cannot be attacked collaterally. * * * Examples of these are the allegations and proof of the requisite diversity of citizenship, or the amount in controversy in a Federal court, which, when found by such court, cannot be questioned collaterally; * * * and others of a kindred nature, where the want of jurisdiction does not go to the subject-matter or the parties, but to a preliminary fact necessary to be proven to authorize the court to act. * * * In this class of cases, if the allegation be properly made, and the jurisdiction be found by the court, such finding is conclusive and binding in every collateral proceeding. * * *

The filing of the affidavit of good cause, if it was jurisdictional at all,[2] certainly did not go to the ju-

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[2] As the court below noted, in *United States* v. *Zucca*, 351 U.S. 91, 99, this Court spoke of the affidavit as a "procedural prerequisite to the maintenance of proceedings". The rulings in *Matles* v. *United States*, 356 U.S. 256 and *United States* v. *Diamond*, 356 U.S. 257, did make it clear that failure to file could not be cured by late filing and that a decree entered in a case where the affidavit had not been filed

risdiction of the parties or the subject matter of the action. It was at most a semi-jurisdictional requirement, which would not furnish a basis for collateral attack. The decisions of this Court confirm the view that, whatever "jurisdictional" aspects can be attributed to the filing of an affidavit of good cause, the failure to file did not oust the trial court of jurisdiction so as to render its judgment void and subject to collateral attack. In *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371, the determination of a court that it had jurisdiction in a bankruptcy proceeding was held binding even though the applicable jurisdictional statute was subsequently held unconstitutional. See also *Stoll* v. *Gottlieb*, 305 U.S. 165; *United States* v. *Williams*, 341 U.S. 58, 66. As pointed out in the *Williams* case (341 U.S. at 67), *Kalb* v. *Feuerstein*, 308 U.S. 433 (on which petitioner relies) represented a decision that the state court, whose judgment was there under attack, had no jurisdiction at all over the subject matter, since the federal statute had ousted state courts of all independent power over farmer bankrupts. Similarly, *United States* v. *United States Fidelity and Guaranty Company*, 309 U.S. 506, involved a ruling that the court had no jurisdiction over the subject matter of a counter-claim beyond the amount of the original suit since sovereign im-

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was subject to reversal on direct appeal, but the Court did not in those *per curiam* decisions characterize as "void" a denaturalization judgment which had been entered in a proceeding initiated without the filing of an affidavit.

munity was a matter of fundamental jurisdiction which could not be waived.

The general law on the subject of what renders a judgment void for the purposes of Rule 60(b)(4) is summed up in 7 Moore's *Federal Practice* (2d ed. 1955), pp. 266-267, as follows:

> * * * except for the rare case where power is plainly usurped, if a court has the general power to adjudicate the issues in the class of suits to which the case belongs then its interim orders and final judgment, whether right or wrong, are not subject to collateral attack, so far as jurisdiction over the subject matter is concerned.
>
> And so-called quasi-jurisdictional facts are not a part of jurisdiction over the subject matter, and the lack thereof will not afford the basis for a collateral attack upon a judgment rendered by the courts which we are discussing.
>
> And hence a judgment of a federal court is not void, and hence is not subject to collateral attack on the ground that the rendering court lacked federal jurisdiction, although the judgment is subject to direct attack on that ground.

Under these principles, the absence of an affidavit of good cause rendered the judgment subject to reversal on direct review, but not "void" for the purposes of Rule 60(b)(4).

2. The judgment is not subject to be set aside under any other provision of Rule 60(b). Petitioner's attempt to invoke subdivision (5), providing that a judgment shall be set aside if "it is no longer equitable that the judgment should have prospective application", is unavailing. The prospective applica-

tion of this judgment stems wholly from the consequences that flow from the part of the judgment that has already been completed, *i.e.*, the vacation of the judgment of naturalization and the cancellation of the certificate of naturalization. As this Court said in *United States* v. *Swift & Co.*, 286 U.S. 106, 119, in recognizing the principle which subdivision (5) later embodied, "The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making. We are not at liberty to reverse under the guise of readjusting". Petitioner is seeking a reversal of the judgment of the District Court, not a readjustment. That is not within the scope of subdivision (5).

As to subdivision (6), petitioner has presented no considerations justifying relief from the judgment other than the suggestion that, in the light of the recent decision of this Court in *Nowak* v. *United States*, 356 U.S. 660, his appeal might have had more chance of success than he thought at the time (in addition to his point about the failure to file the affidavit at the outset). Aside from the fact that it is far from certain that the *Nowak* decision would have required reversal on the different record presented as to petitioner, this is not a basis for invoking subdivision (6). No reason is set forth for petitioner's failure to proceed with his appeal after noting it. Petitioner does not even allege any facts similar to the allegations of poverty and advice by a government agent which the majority of this Court rejected as reasons for setting aside a judgment of denaturalization in *Ackermann* v. *United States*,

340 U.S. 193, but which the dissenting justices there thought a sufficient basis for invoking subdivision (6) of Rule 60(b). Nor does petitioner show a good reason for the delay of over two years after the decision of this Court in *United States* v. *Zucca*, 351 U.S. 91, before taking some action on the basis of that decision. The ruling below is therefore *a fortiori* from *Ackermann*. In *Klapprott* v. *United States*, 335 U. S. 601, 613, where the circumstances were regarded as sufficient to justify vacation of the judgment, the opinion of Mr. Justice Black recognized that the one-year limitation applicable to subdivision (1) of Rule 60(b) "would control if no more than 'neglect' was disclosed by the petition." Here, petitioner shows no more than neglect, not even excusable neglect. The fact that a subsequent decision may possibly have made his neglect unwise is not a basis for setting aside a final judgment. *Ackermann* v. *United States*, 340 U.S. 193; see *Scotten* v. *Littlefield*, 235 U.S. 407, 411.

CONCLUSION

The decision below is correct and there is no conflict of decisions. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1959.

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